the first respondent and in fact the second respondent requested for the issue of the title to the first respondent (see p (a)10 of the appeal record) and consequently the Settlement Officer did make such an order as per the settlement order which was gazetted subsequently under s 95(2) (see p (a)44 of the appeal record). On the issue that no document of title has been issued as yet, to my mind, it has no substance as it is a matter of time that the issue document of title will be given to the first respondent as decided by the Settlement Officer as per the settlement order.

As regards the contention of the appellant that he was misled by the second respondent for not putting up his claim under the settlement of state lands scheme, I regret to say that it was brought about by his own fault for not exercising his statutory rights as s 93(2) of the Code clearly allows him to appear in person or by an advocate or by any representative approved by the Settlement Officer and produce all documents held by him or under his control affecting the state land claimed by him. Even if he has not presented his claim under the provision of s 93(1), the Code allows him under s 94(3) to assert his claim provided the settlement order has not been published under s 95 and the Settlement Officer is satisfied that he is entitled to any right to the land as if he had presented a claim within the time prescribed. However, once a settlement order has been made and published accordingly in the gazette the Settlement Officer can only, by notice in the Gazette, correct any clerical errors and may make clerical amendments or additions to the settlement order, as may be necessary to give effect to his decision and no more.

With respect, I do not think that it can be strenuously argued that the word 'any person' in s 102(1) of the Code can wholesale include the appellant unless he files his claim to the Settlement Officer in accordance with the provisions of the Code and only then can he be said to have been aggrieved by any act or decision of the Settlement Officer and invoke his legal right under s 102 of the Code accordingly. In my opinion, by failure of the appellant to exercise his statutory rights in accordance with the provisions laid down in the Code he has clearly by his action extinguished his rights to claim under the Code and cannot now try to invoke s 102 of the Code by bringing the matter by way of an appeal to the court of a Magistrate of the First Class. In other words I am of the view that the appeal has not been properly brought before the court of a Magistrate of the First Class and the learned magistrate should have struck out the appeal and it is really not an issue of want of jurisdiction as decided by her. In the circumstances I would strike out the appeal with costs to the first respondent.

If at all there is a breach of the agreement by the second respondent, it is open to the appellant to assert his contractual rights elsewhere and not by way of an appeal under s 102 of the Code. In view of my judgment I find that it is unnecessary for me to determine on the second issue raised by the advocate for the first respondent on whether the subject matter of the land is the same one or otherwise. In any event it would appear from the letter of the Pengarah Tanah dan Ukur, Bahagian Pertama (see p (a)31 of the appeal record) that the subject land is the same and, it would appear, was wrongly described by the advocate for the appellant vide their letter dated 22 December 1981.

*Appeal dismissed.*

Solicitors: *Satem, Sagah & Chai; Cheng & Cheng.*

Reported by *Yap Shao Sin*

---

## Dunia Muzik WEA Sdn Bhd & Anor v Koh Tay Eng

HIGH COURT (KUALA LUMPUR) – SUIT NO C22-185-86
GUNN CHIT TUAN J
21 MARCH 1989

*Copyright – Passing-off – Whether defendant in breach of plaintiffs' copyright in musical works – Use by plaintiffs of stickers bearing watermarks on genuine cassettes – Anton Piller order*

The plaintiffs were engaged in the making, production and publication of musical works and sound recordings and had the copyright in the musical works and sound recordings in question. The plaintiffs alleged that the defendant, the sole proprietor of Syarikat Oscar Records and Tapes, which sold musical works and sound recordings in cassette and other forms, had: (i)infringed the plaintiffs' said copyright in the musical works; (ii) passed off the musical works not of the plaintiffs' manufacture as and for that of the plaintiffs; (iii) reproduced and/or disposed of unlawfully, without the plaintiffs' licence or consent, the plaintiffs' said musical works in cassettes or any other material form; (iv) caused, enabled or assisted others to reproduce and/or dispose of unlawfully, the plaintiffs' said musical works without the plaintiffs' consent and (v) converted to and for his own use and purpose, the plaintiffs' said musical works. The plaintiffs also sought (i) an order for the delivery up to them of, inter alia, all the infringing copies of the said musical works in the form of musical cassettes and (ii) an inquiry as to damages or an account of profits and payment of all sums found due with interest thereon.

The plaintiffs' witness had purchased some of the infringing musical works from the defendant's shop, some of which had security stickers on which there were no watermarks and others which had very poorly printed labels. The plaintiffs then served an Anton Piller order on the defendant.

**Held,** granting the plaintiffs' application for an injunction:

(1) The plaintiffs had proved on the balance of probabilities that the cassettes were not manufactured by the plaintiffs.

There had therefore been an infringement by the defendant of the plaintiffs' copyright in the said musical works.

(2) The defendant had been passing off those musical works not of the plaintiffs' manufacture as those of the plaintiffs.

(3) As the defendant had been reproducing and/or disposing of, unlawfully, without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassettes or had otherwise caused or assisted others to reproduce and/or dispose of, unlawfully, without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassettes, there must necessarily be an injunction to restrain him, whether by himself, his servants or agents, from doing any of those acts.

(4) There had also to be an order for delivery to the plaintiffs of all infringing copies of the said musical works in the form of cassettes or in other material form together with packaging, labels, invoices, bills, documents and books as were in the defendant's possession, power, custody or control.

(5) An inquiry would also be held as to damages or, at the plaintiffs' option, an account of profits and payment of all sums found due upon taking such inquiry or account with interest thereon, together with costs of the action.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-16 of 1989.]

*VL Kandan* for the plaintiffs.
*K Nadarajah* for the defendant.

*Cur Adv Vult*

**Gunn Chit Tuan J:** The first and second plaintiffs are companies incorporated and existing under the laws of Malaysia and are engaged in, inter alia, making, producing and publishing musical works and sound recordings. The first plaintiff is the wholly-owned subsidiary company of the second plaintiff and is the owner of the following musical works entitled: (i) Tajam (ii) Bukan Kerana Nama (iii) Taligram (iv) Kenyataan (v) Apa Yang Dipandang (vi) Ketuk Pintu (vii) Mana Harummu (viii) Pulanglah Ke Pangkal Jalan (ix) Cubakau Fikirkan (x) Kelukaanku Keranamu (xi) Keterlanjuran Denganmu (xii)Hatiku Ragu Tanpa Kepastian (xiii) Sikapmu Meragukanku (xiv) Perjalananku (xv) Cinta Yang Terbiar (xvi) Cinta Hanya Bayang Bayang (xvii) Mati Hidup Semula.

The first plaintiff had authorized the second plaintiff to record the above musical works in cassette form and to sell the same. The copyright in the musical works numbered (i) to (ix) above were acquired by the first plaintiff

(a) in respect of Tajam and Pulanglah Ke Pangkal Jalan from one Suhaime bin Roa
(b) in respect of Bukan Kerana Nama and Mana Harummu from one Mohd Bakri Johari, and
(c) in respect of the musical works entitled Taligram, Kenyataan, Apa Yang Dipandang, Ketuk Pintu, Cubakau Fikirkan from one Ramli Sarip.

The copyright in the musical works numbered (x) to (xvii) above were acquired by the first plaintiff

(a) in respect of Kelukaanku Keranamu from one Kesuma B Booty Jacobs;
(b) in respect of Keterlanjuran Denganmu and Sikapmu Meragukanku from one Abdul Mannan bin Ngah;
(c) in respect of Hatiku Ragu Tanpa Kepastian and Perjalananku from one Adnan bin Abu Hassan;
(d) in respect of Cinta Yang Terbiar from one Roslan bin Tajuddin @ S Shahlan;
(e) in respect of Cinta Hanya Bayang Bayang from one Azmi Hamzah;
(f) in respect of Mati Hidup Semula from one Jamal Ubaidullah @ Jamal Abdillah.

The first plaintiff had given the second plaintiff and no one else the exclusive right and licence to make and publish the above musical works as musical works and as sound recordings. Pursuant to the said licence the second plaintiff first made and published in May 1986, the said musical works as musical works and sound recordings in cassette form. Before the second plaintiff so published the said musical works and sound recordings in Malaysia they were not published by any one else in this country or elsewhere. The copyright in those musical works and sound recordings therefore vests in the plaintiffs and no one else and the plaintiffs have not authorised the defendant or any one else to reproduce and distribute the said musical works and sound recordings.

The plaintiffs' cassettes containing their musical works and sound recordings have the following distinctive get-up:

(a) the photograph of the singer which appears prominently in the front;
(b) the trademark WEA appears on the front and on the spine or edge of the cassette;
(c) in the case of the cassette entitled 'Ramli Sarip: Bukan Kerana Nama' also carries the plaintiffs' distinctive sticker with a watermark.

The defendant Koh Tay Eng is the sole proprietor of Syarikat Oscar Records and Tapes. His principal place of business is at 30 Jalan Bagor, Taman Petaling, Kelang, Selangor, and his business is, inter alia, that of selling musical works and sound recordings in cassette and other forms. The plaintiffs have in the past sold to the defendant their musical works and sound recordings entitled Ramli Sarip: Bukan Kerana Nama and Jamal Abdillah: Mati Hidup Semula.

On 24 July 1986, the plaintiffs filed a writ of summons with a statement of claim against the defendant to pray for judgment for the following:

(i) An injunction to restrain the defendant, whether by himself, his servants or agents or any of them or

otherwise howsoever from doing the following acts or any of them, that is to say:

(a) Infringing the plaintiffs' copyright in the said musical works.
(b) Passing off the musical works not of the plaintiffs' manufacture as and for that of the plaintiffs.
(c) Reproducing and/or disposing of unlawfully without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassettes or any other material form.
(d) Causing, enabling or assisting others to reproduce and/or dispose of unlawfully without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassette or any other material form.
(e) Converting to and for their own use and purpose the plaintiffs' said musical works in whatsoever manner including reproducing copies thereof without the licence or consent of the plaintiffs for sale, rental or hire for public, private or domestic listening and/or for exhibiting and distributing for purposes of trade.

(ii) An order for delivery up to the plaintiffs of all infringing copies of the said musical works in the form of musical cassettes or in other material form together with packaging, labels and jacket covers for use with such musical works, invoices, bills, documents, books, delivery orders and receipts as are in the defendant's, his servants' or agents' possession, power, custody or control.
(iii) An inquiry as to damages or at the plaintiffs' option an account of profits and payment of all sums found due upon taking such inquiry or account with interest thereon.
(iv) Costs.

In his statement of defence the defendant, inter alia, denied that the plaintiffs are the owners of the copyright of the musical works referred to in the statement of claim. But the defendant admitted para 9 of the statement of claim which averred that the defendant's place of business is at 30 Jalan Bagor, Taman Petaling, Kelang, Selangor and at 37 Jalan Goh Hock Huat, Kelang, Selangor and carried on business of, inter alia, selling musical works and sound recordings in cassette forms. The defendant also denied infringing the plaintiffs' copyright in the said musical works by selling to one Kassim Cha Tong one cassette entitled Bukan Kerana Nama containing infringing copies of the said musical works numbered (i) to (ix) above and one cassette entitled Mati Hidup Semula containing the said musical works numbered (x) to (xvii) above. The defendant further averred that the cassettes entitled Mati Hidup Semula and Suratan Atau Kebetulan were in fact purchased from the plaintiffs and therefore not infringing copies as alleged by the plaintiffs. The defendant also denied that he has been dealing in sound cassette recordings not belonging to the plaintiffs and averred that he as an authorised agent of the plaintiffs only purchased sound recordings from the plaintiffs and the cassettes found at his premises were all genuine WEA products.

According to one Kassim Cha Tong (PW1), a director of the International Federation of Phonogram Industries ('IFPI') (SEA) Sdn Bhd and deputy regional director of IFPI which advises on legal matters relating to copyrights, he looks after the music industry. He stated that on 15 July 1986 he went to the premises of Syarikat Oscar Records and Tapes at 37 Jalan Goh Hock Huat, Kelang. When he was in the shop, a lady whom he later found out was the wife of the proprietor, asked him what he wanted. He asked for a copy of 'Bukan Kerana Nama' by Ramli Sarip (exh P1) and 'Mati Hidup Semula' by Jamal Abdillah (exh P2). He also chose a third cassette namely, 'Magdalena' by Freddie Aguilar (exh P3). He paid $24 for them and the lady gave him a receipt (exh P4).

On 25 July 1986 at about 5.45 pm PW1 accompanied one Gita Nair (PW2) to the said premises where PW2 served an Anton Piller order on the same lady from whom he had bought the cassettes. The lady requested that the said order be served on the proprietor. She made a telephone call and a gentleman called Koh Tay Eng whom he identified as the defendant came to the premises. Pursuant to service of the order five cassettes of Ramli Sarip's 'Bukan Kerana Nama' (exh P5A-E) and one cassette of Jamal Abdillah's 'Mati Hidup Semula' (exh P6) were recovered. He identified those cassettes as infringement of the plaintiffs' cassettes. In the case of P1 and P5 there were no watermarks in the security stickers. On P2 and P6 there were no stickers but he was able to identify the infringement from the poor printing of the labels.

Under cross-examination PW1 explained that by looking at P1 he could see that the word 'Bukan' is almost obliterated. Moreover, the face of the artist is darker. When this witness was shown four photographs (exh P8A-D) he identified them as the shop he visited on 15 July 1986 and 25 July 1986. He also explained that he did not make a police report after he had ascertained that the cassettes which he bought were infringements because he knew that the matter could be pursued in either the criminal or civil courts. For a civil suit the plaintiffs would have control of the proceedings whereas in a criminal case the police would have control of the case.

The said Gita Nair (PW2), an advocate and solicitor, is a legal assistant in Shearn Delamore & Co, and she confirmed that on 25 July 1986 at about 5.45 pm, she went to 37 Jalan Goh Hock Huat to serve an Anton Piller

order. She told the court that the premises concerned was a corner shop selling cassettes and identified it as shown in the photographs marked exh P8A-D. She met a sales-girl who said that the proprietor was in another premises and contacted him by phone. About 10 minutes later Koh Tay Eng whom she also identified arrived and the order was served on him. He allowed them to search the premises, and as he did not want the business in the shop to be interrupted he asked them to go to his other shop at 30 Jalan Bagor where PW2 made out a receipt (exh P10) which was signed by her and the defendant in her presence.

The managing director of both plaintiffs, one Gunther Zitta (PW3), said that he had been in the music industry for about 25 years and was familiar with copyright matters in commerce. He told the court that in May 1986, he released an album in cassette form of Ramli Sarip and in the month of June he released the album of Jamal Abdillah. The first plaintiff was the holder of copyright of the cassettes. The first plaintiff had authorised the second plaintiff to duplicate and produce them. The sound recordings were made by them in Kuala Lumpur on ¼" master tapes and they then mass-produced them for sale. The tapes were duplicated for them by EMI Tapes (M) Sdn Bhd. He said they never gave the defendant or anybody else permission to produce the tapes. The distinguishing feature is the security sticker on the spine of the cassettes. It is a special paper which cannot be removed and carries their printed logo as shown on their certificates of registration under the Trade Marks Act (exhs P14A and B). The plaintiffs were entitled to use the said trade mark (exh P14C).

The witness then said that the plaintiffs were the first to use the stickers as security. They were manufactured in the United States of America exclusively for their use. It is impossible to produce the stickers because of the technical features which cannot be seen without a verifier (exh P15) through which it can be seen that the colour on the sticker changes from purple to white. The witness then pointed out that in the original cassettes the logo is upright whereas on exhibit P1 one row is upright and the other is inverted. Moreover, the sticker on exhibit P1 is removable.

During cross-examination the witness stated that the in-lay card on exhs P1 and P2 were not made by them. He admitted that they had printed tens of thousands of cards which could not be identical, so that there are variations in colour. He agreed that without stickers it would be difficult to say whether a cassette was original or not and it is impossible to tell by colour alone. He confirmed that EMI were authorised to duplicate their tapes and admitted that about 50 stickers were lost from EMI. He then informed the court that stickers were only put on the cassettes of Ramli Sarip in May 1986, but he could not remember when the stickers were put on the cassettes of Jamal Abdillah. He confirmed that he was supplying the defendant with tapes of Ramli Sarip and Jamal Abdillah amongst others as shown on the invoices of the second plaintiff to the defendant (exh D16A-Z). The witness explained that the defendant would place his order and he would send the cassettes through salesmen the next day and stated that his customers could assume and rely that the cassettes supplied by them are originals. He denied that there was any possibility of interference with the cassettes by his staff or by others or that they had delivered counterfeits. He said that they would check what they received from EMI and they would also check the stickers received from USA. There was no need to check whether the stickers received were genuine or not. They have two colour tones, namely, light blue and magenta, and EMI put the stickers on to the in-lay cards. He admitted that EMI had at least once missed putting on the stickers and that the cassettes had left them without the stickers.

The fourth witness for the plaintiffs was one Wee Yeow Suan (PW4), the factory manager of EMI Tapes. He explained that the second plaintiff normally gave him a marker which is the original music and they would mass-produce them for the second plaintiff to distribute themselves. They would account for every copy produced. He said that he had experience to identify the cassettes to say whether they were produced by them. He could do so by examining the joining and identifying the smell of the tape, that is, the chemical smell. He would also examine the pressure pad and demonstrated to the court how it was done. He could also tell by the cue tone of the tape that is something which cannot be heard. He could also tell by the colour of the casing. Using all those criteria, he identified two cassettes marked exhs P12 and P13 as those which were manufactured by them. He was then shown exhs P1, P2, P5A-E and P6 and he confirmed that they were not manufactured by them. He pointed out that their joinings were not straight. He then smelt them and told the court that there was no chemical smell indicating that the tapes were different from theirs. He also pointed out that the plastic casing was lighter in colour compared to those of exhs P12 and P13. The witness then examined the pressure pad of exhs P1, P2, P5A-E and P6 and said that they all had similar pressure pads and told the court that they were not their regular-size pressure pads.

During cross-examination the witness admitted that he had no special qualifications but said that he had gained knowledge and experience through working. He explained that there could be variations in the joining because of manufacturing defects, but there could be no variation in the colour of the casings which are from one supplier.

The last witness for the plaintiff was one Ho Siew Choon (PW5), the managing director of Metro Engraver Sdn Bhd. He had graduated from the London College of Printing with a diploma and also holds a postgraduate award in graphic reproduction, ie colour separation. He worked in London in 1974 and came back in 1975 and has been working since then. He said that if he was shown some labels he could tell whether they were printed from the same source and at the same time. When he was shown exh P12 he said that the name of the printer was on the label, ie Culture Press. The title of P1 on the label was the same and the printer was also Culture Press. The contents of the labels on P1 and P12 were identical. The colour was also the same but the labels were not printed from the same source, ie the same original film. The witness then explained that he used an anchor detector to detect the angle of the screen. The angle of the screen in P12 is 45 degrees, but there are two angles in P1, namely, 15 degrees and 45 degrees respectively. The witness then examined exhs P5A-E and said that they all have the same angle of the screen, ie 15 degrees and 45 degrees. He said that the label of P12 was not printed from the same original film as P1 and P5A-E and that the labels on P1 and P5A-E could have been made from a film of P12. He then explained that the angle of the screen on P12 was set at 45 degrees and that in order to copy it they would have to alter the angle by 30 degrees. After the witness was shown exh P13 he said that the label had four colours. He used a magnifying glass to look at it and told the court that the angles are 45 degrees, 75 degrees, 15 degrees and 90 degrees respectively. When he was shown exhs P2 and P6 he said that the angles are 75 degrees, 45 degrees, 15 degrees and 90 degrees respectively. He said that exhs P2 and P6 were copied from P13 and not made from the original film. The witness then told the court that exh P12 has a security sticker. The colour is purple and there is a flourescent water mark. After looking at exhs P1 and P5A-E, he said that they also had stickers but without a water mark. He said that they were not reproductions of the sticker on P12 but looked like it. They were drawn to look like the sticker on P12.

Under cross-examination this witness confirmed that he could tell whether labels were printed from the same film. He also confirmed that there must be a variation of 30 degrees for a copy to be clear and that reproduction depended on many factors including the quality of the paper. He agreed that there could be colour variation even among originals and that there could be variation although they came from the same film. During re-examination the witness confirmed that the test for deciding whether they all came from the same film is the angle or screen test, and not a visual test.

Koh Tay Eng (DW1) was the first witness for the defence. He said that his office was at 37 Jalan Goh Hock Huat, Kelang, but he moved out of the premises in 1983 and he was not there in 1986. He had bought cassettes from the plaintiffs and prior to 1986 he has had more than five to six years business relationship with them. He said that he had bought different albums from other sources but he bought the two albums concerned solely from the plaintiffs, and produced some bills (exh D16A-Z). He then produced a document (exh D17) to show that he had bought 1,190 pieces of Jamal Abdillah's album and 515 pieces of Ramli Sarip's album. He told the court that he sometimes placed his orders with the plaintiffs through the phone and sometimes their salesmen would come and take his orders. When he placed his orders by phone the stocks were sent to him either by bus, taxi or one of their staff. If the goods were delivered by bus, they were thrown outside for them to collect. After delivery they would check the number of cassettes against the bills. They received more than 10,000 cassettes at one time. He said that he had shifted from Jalan Goh Hock Huat in 1983 and therefore did not agree with the statement of PW1 that he had bought the cassettes at 37, Jalan Goh Hock Huat on 15 July 1986. He also denied that the receipts marked exh P4 was issued by his shop and said that in 1983 they only issued receipts similar to those shown in exh D28. When he moved to Jalan Bagor he issued receipts similar to those shown in exh D29. The witness denied that on 25 July 1986 he saw a group of people from the plaintiffs. He then changed his evidence and said that when the plaintiff's representatives arrived they telephoned him. On that day he was at 30 Jalan Bagor and went to meet the plaintiff's representatives at the front of his shop at 25 Jalan Taiping where a woman gave him some documents. He then told the court that after the documents were served on him he did not see the plaintiff's representatives making a search. They were there for half an hour before leaving with him for Jalan Bagor where they also requested permission to look around. There they searched for 30 to 45 minutes and opened boxes, shelves and drawers. In fact they looked into every corner of the shop. Then the woman asked him to sign a piece of paper which she said was for her to take possession of something for examination. When he was shown a receipt marked exh P10 he said that he did sign a paper in his shop after the woman had told him that she got the tapes from the other side of the river. At first the witness said that he did not see the plaintiffs' representatives take anything but then changed his evidence and said that he knew what tapes they had taken, namely, Ramli Sarip's and Jamal Abdillah's albums. He had those tapes in both the shops.

During cross-examination DW1 admitted that he was the sole proprietor of Syarikat Oscar Records & Tapes and he was the defendant in this case. He admitted that PW2 was the woman who came to his shop that day but denied that she had identified herself as a lawyer. He

also identified PW1 as Kassim Cha Tong, and admitted that he himself was the director of Oscar Records & Tapes Sdn Bhd but denied that the company was on the first floor of 39A Jalan Goh Hock Huat which he said is the secretary's office. When showed the photographs in exh P8, he said that 39A Jalan Goh Hock Huat was not next to it and claimed that after 1983 he had nothing to do with Jalan Goh Hock Huat. When put to him he denied that 25 Jalan Taiping was 37 Jalan Goh Hock Huat. He then said that although the shop in question was on three lots it faced Jalan Taiping. He admitted that the shop also had a road frontage with Jalan Melayu and that was where he met the plaintiffs' representatives. He also admitted that he signed the receipt marked exh P10. To him the address was not important and he signed exh P10 because the plaintiffs' representative said that they would return the tapes to him after examination.

The witness then claimed that exhs P1, P2, P5 and P6 were obtained from the plaintiffs but he admitted that he had blank cassettes for sale and that they carried his own trade mark. He also admitted that he had 20 to 30 song tapes which were taken away by officers from the Ministry of Commerce and Industry in August 1988, but claimed that they belonged to Rich's Supermarket which were left in his shop for sale. When put to him he denied that he had made copies of tapes which he had bought from the plaintiffs and denied that exhs P1, P2, P5 and P6 were copies made by him or by his agents.

The defendant's wife, Lee Guet Mooi (DW2), then gave evidence. She denied that she saw PW1 on 15 July 1986. Then she changed her evidence and said that she saw him that day and remembered what happened but claimed that it was impossible that PW1 had bought tapes from her because she did not conduct sales. Then she admitted that she did sell the tapes to PW1. She said that on 25 July 1986 she was in her house when she received a telephone call from her employee to say that WEA people had come to their retail shop at 25 Jalan Taiping. She informed her husband and then they went there in their van. Later someone who looked like PW1 came into their van and they went back to 30 Jalan Bagor where they searched everywhere but did not find anything. Then the manager of WEA and an Indian woman wanted her husband to sign some documents and to take away some tapes. She denied that the receipt (exh P4) was in her handwriting or that it was issued by her at any time.

After hearing and observing the witnesses for both parties, I found that all the witnesses for the plaintiffs were witnesses of truth but I found that DW1 and DW2 were shifty and mendacious witnesses. On the evidence adduced and accepted by me I found that the plaintiffs have proved on the balance of probabilities that on 15 July 1986 the defendant's wife (DW2) did sell to Kassim Cha Tong (PW1) exhs P1, P2, and P3 and issued a receipt (exh P4) to him. On 25 July 1986 PW1 did go to the defendant's premises as shown in exh P8 where PW2 served on the defendant (DW1) an Anton Piller order. Pursuant to service of that order five cassettes of Ramli Sarip's 'Bukan Kerana Nama' (exh P5A-E) and one cassette of Jamal Abdillah's 'Mati Hidup Semula' (exh P6) were recovered by them. The plaintiffs have also proved on the balance of probabilities that exhs P1, P2, P5A-E and P6 were not cassettes manufactured by the plaintiffs.

Mr Nadarajah, counsel for the defendant, stated that there were what he called three limbs to the defence. He said that although exhs P1 and P2 were bought by PW1, yet PW1 was confused as to where he had bought the exhibits. He stated that 25 Jalan Taiping and 37 Jalan Goh Hock Huat were different places and PW1 was doubtful where P1 and P2 were purchased. Secondly, he stated that even if the tapes were taken from the defendant's premises, he claimed that they were supplied by the plaintiffs and that according to PW3's evidence it was possible that some tapes were stolen and sold as infringing copies. Thirdly, he contended that the defendant honestly believed that what he purchased from the plaintiffs were their original cassettes. He referred to the evidence of PW5 and stated that it was impossible for the defendant as a businessman to spot fakes or infringing copies. He also submitted that it was difficult for the defendant to have manufactured the infringing copies.

Dato Kandan, counsel for the plaintiffs, referred to the statement of agreed facts. He then referred to para 9 of the statement of claim and para 4 of the statement of defence which were filed more than two years ago and pointed out that in the pleadings the defendant had admitted that one of his places of business was at 37 Jalan Goh Hock Huat, Kelang, Selangor. He also referred to the photographs marked P8 and pointed out that both PW1 and DW1 knew which shop was referred to. Counsel then pointed out that PW2 also affirmed that she went to the same shop. He then referred to the list marked exh P10 and pointed out that it was stated therein that the infringing cassettes were handed over by the defendant at 37 Jalan Goh Hock Huat, Kelang, Selangor on 25 July 1986. Moreover, the defendant had sworn affidavits (exhs P32-34) drafted by his own solicitors wherein it was stated that his address was 37 Jalan Goh Hock Huat. Counsel submitted that the defendant was estopped from denying that the cassettes in question were taken from his premises. In any case, he also submitted that it mattered not where the tapes were taken from so long as they were taken from the defendant. Counsel then referred to the defendant's statement of defence and pointed out that according to it there was only one defence, namely, that all cassettes sold by him were genuine. He then referred to the evidence of PW4 and PW5 and pointed out that

the plaintiffs have proved that exhs P1, P2, P5A-E and P6 were not genuine. He also pointed out that the plaintiffs' genuine cassettes had stickers with water marks whereas the defendant's infringing cassettes had stickers without water marks.

Having considered all the evidence and the submissions of both counsel, I was satisfied that there has been infringement of the plaintiffs' copyright in the said musical works and that the defendant has been passing off those musical works not of the plaintiffs' manufacture as those of the plaintiffs. As the defendant has been reproducing and/or disposing of unlawfully without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassettes or has otherwise caused or assisted others to reproduce and/or dispose of unlawfully without the licence or consent of the plaintiffs, the plaintiffs' said musical works in cassettes, there must necessarily be an injunction to restrain him whether by himself, his servants or agents from doing any of those acts. There must also be an order for delivery to the plaintiffs of all infringing copies of the said musical works in the form of cassettes or in other material form together with packaging, labels, invoices, bills, documents and books as are in the defendant's possession, power, custody or control. I also ordered that there be an inquiry as to damages or at the plaintiffs' option an account of profits and payment of all sums found due upon taking such inquiry or account with interest thereon, together with costs of this action.

*Order accordingly.*

Solicitors: *Shearn Delamore & Co*; *K Nadarajah & Partners*.

Reported by *Yap Shao Sin*

---

## Masnelan Pakpahan v Public Prosecutor

HIGH COURT (PENANG) – CRIMINAL APPLICATION NO 44-5-89
MOHAMED DZAIDDIN J
9 MARCH 1989

*Criminal Procedure – Petition of appeal – Application for leave to file appeal out of time – Delay due to sheer inadvertence – Omission of material particulars in affidavit – No proposed petition of appeal attached to application – Whether application ought to be granted – Criminal Procedure Code (FMS Cap 6), s 310*

The applicant was convicted and sentenced by the magistrate's court on 30 June 1988. On 8 July 1988, his solicitors filed the notice of appeal. On 23 August and 6 December 1988, the solicitors applied to the magistrate's court for the notes of evidence. On 19 December, the court sent to the solicitors the notes of evidence and grounds of decision but as the solicitors were under the impression that documents had not been sent, they despatched a reminder to the magistrate's court. Subsequently, upon a search made in his office, it was discovered that the document had been placed in a different file and by which time the period of ten days to file the petition of appeal under s 307(iv) of the Criminal Procedure Code had expired.

The applicant then applied under s 310 of the Criminal Procedure Code for leave to file his petition of appeal out of time, claiming that the delay was due to sheer inadvertence. However, the affidavit supporting the application did not spell out material particulars about the appeal, such as the offence for which the applicant was convicted and the sentence.

**Held**, dismissing the application:

(1) The underlying principle of s 310 of the Criminal Procedure Code is to allow a judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case.

(2) It is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal.

**Legislation referred to**
Criminal Procedure Code (FMS Cap 6) ss 307(iii), (iv), 310

*Yeoh Chin Chong* for the applicant/appellant.
*Abdul Karim bin Abdul Jalil* for the respondent.

*Cur Adv Vult*

**Mohamed Dzaiddin J**: By this notice of motion, the applicant/appellant applies under s 310 of the Criminal Procedure Code for leave to file his petition of appeal out of time and that he be allowed to proceed with the appeal against his conviction and sentence. Section 310 states:

> A judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in the matter.

The application is supported by an affidavit of Mr Teh Beng Chneah, his counsel, affirmed on 16 February 1989. Unfortunately, this affidavit did not spell out clearly the relevant materials in support of the application. On the whole, the deponent has omitted material particulars which has left me completely in the dark about the whole case. As an example, he merely deposed that he was the counsel in charge of both cases in which the applicant was convicted and sentenced by the magistrate, Balik Pulau on 30 June 1988. The title of the application mentioned about the two cases in question vide Balik Pulau Magistrate Court Arrest Cases No 92-67/86 and 92-68/86. However the particulars of the charges, ie the offence for which the applicant was convicted and the